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# Protection of the Everglades Ecosystem: A Legal Analysis

Cheryl Lynn Jamieson\*

## I. Introduction

The everglades marsh of southern Florida encompasses a unique region of the world. It has been described as a thick curving river of grass referred to by the Indians as *Pa-hay-okee* or "Grassy Water."<sup>1</sup> Saw grass or sedge (*Eleocharis jamaicensis*)<sup>2</sup> extends for 3,500 square miles, one hundred miles from Lake Okeechobee to the Gulf of Mexico, and ranges from fifty to seventy miles in width.<sup>3</sup> The ecosystems of this tropical region support a diversity of wildlife. In 1930, the then Secretary of the Interior described the area as one of national and not merely local interest. "The tropical plant and animal life, the excellent fishing, and the bird life, which is remarkable both for the number of species and for abundance of birds . . . are sufficient to give the area a national interest."<sup>4</sup>

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1. M.X. DOUGLAS, *THE EVERGLADES: RIVER OF GRASS* 3 (Rev. ed. 1974). The area is described as a river of grass fifty miles wide and nine inches deep which flows south in periods of high water. It is a matter of dispute as to whether this is a river or surface water. MALONEY, PLAGER & BALDWIN, *WATER LAW AND ADMINISTRATION, THE FLORIDA EXPERIENCE* 248 n.1 (1968) [hereinafter *Maloney*].

2. DOUGLAS, *supra* note 1, at 5.

3. *Id.*

4. L. CARTER, *THE FLORIDA EXPERIENCE: LAND AND WATER POLICY IN A GROWTH STATE* 109 (1974). Secretary of the Interior, Ray L. Wilbur indicated that he was strongly in favor of establishing the park in order to preserve a piece of the United States' only subtropical wilderness. He was concerned, however, about the proposed park's supply of fresh water and in a letter to Horace Albright, who was the Director of the National Park Service, he stated "that a wide area to the north of the park

The key component necessary for the survival of the Everglades ecosystem is water, in particular, water of high quality in a natural flow of seasonal rhythms. "It is the quality and quantity of water (volume, distribution, and timing) that have produced the myriad of ecosystems and unique assemblages of wildlife for which the Everglades are famous."<sup>5</sup> The natural flow of water which existed in the region for five thousand years has been greatly altered during the twentieth century. The hydrologic unit consisting of the Kissimmee River-Lake Okeechobee-Everglades system is now managed by a complex system of canals, pumping stations and control structures which divert, alter and diminish the Everglades National Park's access to natural flow and high quality water.<sup>6</sup>

The Everglades National Park (ENP or the Park) is the southernmost unit of this hydrologic system and as such, is the last receiver of water.<sup>7</sup> Today, the existence of the wetland ecosystems of the park is being jeopardized by water management policies and competing water uses.<sup>8</sup> The park is the third largest national park in the United States, and is located in the largest wilderness area of the eastern U.S.<sup>9</sup> containing approximately one-fifth of the historic Everglades marsh.<sup>10</sup> It has been designated as a national park,<sup>11</sup> an International Bi-

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should be kept as a natural watershed." *Id.*

5. Scheidt, Flora & Walker, *Water Quality Management for Everglades National Park*, paper presented at the N. Am. Lakes Management Soc'y 7th Int'l Symposium 2 (Nov. 4, 1987) (on file with Pace Environmental Law Review) [hereinafter Scheidt].

6. *Id.*

7. *Id.*

8. M. FROME, *The Everglades*, in RAND McNALLY NATIONAL PARK GUIDE 30 (16th ed. 1982). See generally Loftis, *The Imperiled Everglades: A Wilderness in Trouble*, Miami Herald, Oct. 4, 1987, at 1A.

9. Kahn, *Restoring the Everglades*, in 71 Sierra 41 (Sept./Oct. 1986). "Where it once encompassed 9,000 square miles, the Kissimmee River-Lake Okeechobee-Everglades ecosystem has been reduced to a remnant 6,000 square miles of wetlands." *Id.* Of this, the Everglades National Park occupies 2,700 square miles or 5,700 square kilometers. Scheidt *supra* note 5, at 2.

10. Scheidt, *supra* note 5, at 2.

11. 16 U.S.C. § 410(c) (1982). The enabling legislation of 1934 states that "[t]he said area or areas shall be permanently reserved as a wilderness, and no development . . . shall be undertaken which will interfere with the preservation intact of the unique flora and fauna and the essential primitive natural conditions now prevailing

osphere Reserve,<sup>12</sup> a World Heritage Site,<sup>13</sup> and a federal wilderness area.<sup>14</sup> Yet, in spite of these important preservative or protective designations and statutory mandates, the continued existence of the park is being threatened by numerous federal, state, and local policies and actions. Currently, the most serious of the external threats to the ENP is the disruption of the natural flow of water caused by conflicting federal and state water management practices,<sup>15</sup> the development of drainage systems, pollution from agricultural development, and conversion of the peripheral wetlands.<sup>16</sup> It is interesting to note that nearly twenty years ago, the Department of the Interior foreshadowed the destruction of the South Florida ecosystem in an environmental impact report conducted for a proposed jetport in the Big Cypress Preserve. The report concluded that "ecosystem destruction in South Florida [would] take place through the medium of water control, through land drainage and changed rates of discharge. It [would] come about through [sic] decrease in quality of water by both eutrophication and by the introduction of pollutants, such as pesticides."<sup>17</sup>

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in this area." An Act to Provide for the Establishment of the Everglades National Park in the State of Florida and for Other Purposes, §4, 48 Stat. 816, 817 (May 30, 1934).

12. Selection, Management and Utilization of Biosphere Reserves, General Technical Report PNW-82 (Mar. 1979). Twelve U.S. parks were selected for this United Nations Educational Social and Cultural Organization (UNESCO) program which seeks to provide a world-wide network of protected natural areas for conserving valuable plant and animal genetic strains, and for scientific research aimed at safeguarding the global environment. 1974 U.N.Y.B. 965 (1974).

13. 53 Fed. Reg. 7247 (1988). The World Heritage Convention criteria for inclusion are listed at 36 C.F.R. § 73.9 (1987).

14. Approximately 1.3 million acres within the ENP out of 1.4 million acres were designated as wilderness pursuant to 92 Stat. 3490 (1978), and are to be administered pursuant to the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1982).

15. Loftis, *supra* note 8, at 22A.

16. *Id.*

17. U.S. DEPARTMENT OF INTERIOR, ENVIRONMENTAL IMPACT OF THE BIG CYPRESS SWAMP Jetport 152 (1969). [hereinafter ENVIRONMENTAL IMPACT - JETPORT]. Although the environmental impact of the jetport on Big Cypress Swamp was the focus of this study, the jetport was planned to be constructed only six miles from the northern boundary of the Everglades National Park. The author of the study, Luna B. Leopold, and his study team recognized that the entire ecosystem of South Florida including the ENP would be significantly affected by the construction of the jetport,

This article examines the legal issues arising from the water management policies and actions relating to the Kissimmee River-Lake Okeechobee-Everglades watershed. Background information on federal and state water management policies in Florida and inadequacies of Florida state planning and environmental law is presented in a factual analysis in Part II, as well as a statement of the current water supply problems of the Everglades National Park. An analysis of federal statutory law focusing on park legislation,<sup>18</sup> the National Environmental Policy Act,<sup>19</sup> the Clean Water Act,<sup>20</sup> the Rivers and Harbors Act,<sup>21</sup> and the Wilderness Act<sup>22</sup> is presented in Part III in an effort to determine which, if any, of these federal protective mechanisms have been employed to protect the water quality, quantity, timing, and distribution essential to the park's survival. A brief analysis of common law doctrines including the public trust doctrine, the federal reserved water rights doctrine, and the law of public nuisance is presented in Part IV. Part V, while recognizing that the problems of competing water uses in southern Florida are exceedingly complex,<sup>23</sup> outlines possible legal remedies which could be applied to the current water supply problems faced by the park.

## II. Background and Factual Analysis

A history of water management in the Kissimmee River-Lake Okeechobee-Everglades region is set forth in order to appreciate the complexity of water management decisions facing South Florida today. Competing uses of water for agricul-

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the development to the area, and uncontrolled land use resulting from it. This study was done prior to the National Environmental Policy Act and was a major factor in a later White House decision to abandon the site. CARTER, *supra* note 4, at 198-208.

18. 16 U.S.C. §§ 1, 1a-1 (1982 and Supp. IV 1986).

19. 42 U.S.C. §§ 4321-4370 (1982 and Supp. IV 1986) [hereinafter NEPA].

20. 33 U.S.C. §§ 1251-1266 (1982 and Supp. 1985).

21. 33 U.S.C. §§ 401-415 (1982 and Supp. IV 1985).

22. See *supra* note 14.

23. Scheidt, *supra* note 5, at 1. Loftis, *supra* note 8, at 22A. Water managers of the South Florida Water Management District (SFWMD) "find themselves caught between contradictory roles assigned to them by state and federal law. In trying to balance the competing needs of farmers, urban residents and wildlife . . . they often satisfy no one." Loftis, *supra* note 8, at 22A.

ture, urban populations, and ecosystem preservation have led to compromises, and often the solution to one problem has led to the creation of another.<sup>24</sup>

#### A. *History of Water Drainage in the Watershed*

The natural flow of the water supply for the Everglades first began from the Kissimmee River. Water accumulated seasonally on the river prairies and flowed through the river into Lake Okeechobee. Water from the lake at times would spill over its southern rim, and together with local rainfall move slowly south through the Everglades, eventually to pass through the coastal zone to Florida Bay and the Gulf of Mexico.<sup>25</sup>

After Florida attained statehood in 1845, the state received title to some 20,000,000 acres of swamp and overflow lands, including the Everglades,<sup>26</sup> pursuant to the Federal Swamp and Overflow Lands Act of 1850. In an attempt to drain the vast area, an early plan was initiated to lower the level of Lake Okeechobee by cutting canals. The first reduction in natural flow to the ENP occurred at the completion of a channel to the Caloosahatchee River. In 1905, the Everglades Drainage District was created by the Florida legislature,<sup>27</sup> and during the next two decades, canals and levees were built. The second reduction in natural flow to the ENP occurred during this period when two overland canals were dug from the lake to tidewater<sup>28</sup> and three small coastal rivers were connected with Lake Okeechobee. The construction of levees around the southern rim of the lake between 1921 and 1926 created the third major disruption to the ENP's water supply. Severe hurricanes led to the destruction of the levees and flooding caused significant loss of life and property dam-

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24. Scheidt, *supra* note 5, at 1.

25. It is estimated that this seasonal flow occurred for over 5,000 years.

26. 43 U.S.C. § 981 (1982). Under this act, Florida was permitted to claim swamp and overflowed lands "for the exclusive purpose of making them productive by drainage and construction of levees." Florida claimed 20.3 million acres. CARTER, *supra* note 4, at 62-63.

27. CARTER, *supra* note 4, at 68-69.

28. ENVIRONMENTAL IMPACT-JETPORT, *supra* note 17, at 62.

age. This resulted in the first federal water control program for the area, and the Army Corps of Engineers constructed protective levees and improved outlet works at Lake Okeechobee which were completed in 1937.<sup>29</sup> Thus, efforts in flood prevention led to the permanent blockage of the ENP's natural water flow from the Kissimmee River through the Everglades and to the ENP. The channeling of the water flow to the Atlantic Ocean and the Gulf of Mexico later led to dried out lands in the lake basin areas and area fires which destroyed local peat soil cover and damaged the ENP.<sup>30</sup>

### B. *Creation of Everglades National Park*

While the Kissimmee River-Lake Okeechobee-Everglades watershed was being altered during the 1920's, a citizens movement was organized to establish "an untouched example of the Everglades of Florida . . . as a national park."<sup>31</sup> This led to a study by the Secretary of the Interior which was presented to Congress in December of 1930.<sup>32</sup> An excerpt of this study indicates that the Secretary of the Interior considered the *biological* preservation of the Everglades.<sup>33</sup> The enabling legislation which was passed in 1934 contains specific language which mandates preservation of the park as a wilderness:

The said area or areas *shall* be permanently reserved as a *wilderness*, and no development of the project or plan for the entertainment of visitors shall be undertaken which will interfere with the *preservation intact* of the unique flora and fauna and the essential primitive natural conditions now prevailing in this area. (Emphasis added).<sup>34</sup>

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29. *Id.*

30. *Id.* at 63.

31. FROME, *supra* note 8, at 29. This was stated by the National Park Service Director, Stephen T. Mather.

32. U.S. Department of Interior, Report to Congress *supra* note 4.

33. "Its primary value would be in the opportunities offered for conservation of the tropical flora and wildlife - particularly the endless varieties of birds and fishes." *Id.*

34. An Act to Provide for the Establishment of the Everglades National Park in the State of Florida and for Other Purposes, § 4, 48 Stat. 816, 817 (May 30, 1934).

Although the park was established in 1934, no money was appropriated for the purchase of lands. All land was to be secured by the federal government through public or private donations.<sup>35</sup> The creation of the park was not without controversy at the state level. The maximum amount of land for which Congress had allowed was greatly reduced in an agreement between the Florida Cabinet and the National Park Service (NPS): 850,000 acres of state property (much from the federal grant of swamp and overflowed lands) were conveyed to NPS and two million dollars were appropriated by the legislature for the purchase of additional lands.<sup>36</sup> The park was dedicated in 1947, in the town of Everglades, with President Truman attending.<sup>37</sup> Boundaries for the park were not fixed until 1958. The park was smaller than the maximum boundaries provided for by the Department of Interior and the area known as Big Cypress was excluded from the boundaries.<sup>38</sup>

### C. Federal Flood Controls

A comprehensive plan for water management in central and southern Florida was prepared by the U.S. Army Corps of Engineers due to the exceptionally heavy rainfall season that resulted in massive flooding in 1947. The Central and Southern Florida Flood Control Project was a part of the federal Flood Control Act.<sup>39</sup> The Corps was responsible for the design and construction of the project, and the state Central and Southern Florida Flood Control District was responsible for the operation and maintenance of the works.<sup>40</sup> A major levee was constructed paralleling the coastal ridge which provided flood protection but also permitted new agricultural and urban development on several hundreds of thousand of acres.

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35. *Id.* § 1.

36. CARTER, *supra* note 4, at 112.

37. *Id.*

38. *Id.* at 115. Natural overland sheet flow of water from the Big Cypress National Preserve is essential to the survival of the ecosystems of Everglades National Park. A conservation movement led to the establishment of the Preserve to safeguard the last natural flow of fresh water to the park. FROME, *supra* note 8, at 29-30.

39. Flood Control Act of 1948, 33 U.S.C. §§ 701c, 701n, 701o, 701s, 701t (1982).

40. ENVIRONMENTAL IMPACT-JETPORT, *supra* note 17, at 64-65.



Three Flood Control District water conservation areas were enclosed to collect excess water from farm land. Eight large pumping stations were installed to remove water from the Everglades Agricultural Area (EAA) and to discharge it either into Lake Okeechobee, or the conservation areas, or both. New canals were built and old ones were improved. The two main priorities of the project were the protection of the lower east coast and the protection of the EAA.<sup>41</sup>

Although some benefits were derived from the project in the first ten years,<sup>42</sup> the project had severe shortcomings which remain critical today:

(1) inequitable cost-sharing arrangements favoring agriculture and discouraging better use and conservation of land and water;

(2) lack of planning and proper prioritizing for storage and delivery of water to other competing needs including the ENP;

(3) lack of policies to limit agricultural and urban expansion and development in accordance with existing water supplies.<sup>43</sup>

The construction of levees continued into the 1960's and the water flow to the ENP was completely blocked with completion of levee 29 in 1962, and is now artificially controlled.<sup>44</sup> In addition, the Kissimmee River was channelized which resulted in the elimination of the river's natural flood plain and the destruction of 25,000 acres of marshlands.<sup>45</sup> As a result, phosphates and nitrates from agricultural runoff were discharged in heavier concentrations to Lake Okeechobee, even-

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41. CARTER, *supra* note 4, at 92.

42. Benefits included flood control for the lower East Coast, partial protection of the Biscayne Aquifer from salt water intrusion, and opening part of the Everglades marsh to recreation. *Id.* at 94-95.

43. *Id.* at 95-96.

44. Although the park normally receives about eighty percent of its water directly from rainfall, the overland flow into the park can be vitally important. The flow comes mostly from the Big Cypress and from those parts of the Everglades lying to the north of the [Tamiami] trail and to the east of the park. *Id.* at 118.

45. *Id.* at 103. Recognizing this serious error, the state has begun to dechannelize part of this project. See *Restoring a River*, 70 *Sierra* 42-43 (Sept./Oct. 1986).

tually causing eutrophication of the lake.<sup>46</sup>

Drought and serious water shortage problems coupled with the Flood Control District's policies of delivering water to farms for irrigation and not releasing water to the park except during wet years, led to a water crisis for the park.<sup>47</sup> During certain years in the 1960's, the park received no water from the Flood Control District's project.<sup>48</sup> A water guarantee for the ENP of no less than 315,000 acre-feet of water per year or 16.5 percent of total deliveries from the project for all purposes including the park (whichever is less) was tied to a Congressional funding authorization for continued flood control projects.<sup>49</sup>

#### D. *Water Supply Problems Currently Facing Everglades National Park*

##### 1. *Agricultural Interests and Pollution*

The Flood Control District (FCD) project resulted in the creation of functional units south of the lake. These units are the Everglades Agricultural Area, which consists of 2800 square kilometers of drained Everglades wetlands mostly within Palm Beach County, and four Water Conservation Areas.<sup>50</sup>

The Everglades Agricultural Area is currently used for sugarcane and winter vegetable production. "Agriculture on a massive scale, encouraged by decades of state and federal boosterism, has consumed 700,000 acres of the Everglades over the past 75 years."<sup>51</sup> Agricultural activities have caused a

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46. Jurgens, *Agricultural Non-point Source Pollution: A Proposed Strategy to Regulate Adverse Impacts*, 2 J. OF LAND USE & ENVTL. LAW 195, 210 (1986).

47. *Id.*

48. *Id.*

49. River Basin Monetary Authorization and Miscellaneous Civil Works Amendment Act of 1970, P.L. 91-282, § 2, 84 Stat. 310 (Jun. 19, 1970).

50. The Water Conservation Areas are water storage reservoirs enclosed by levees which are managed predominantly for water supply and flood control. The primary purpose of these Conservation Areas is flood control and other allied purposes. Lands and works are to be operated and managed for wildlife benefits when this purpose does not interfere with flood control.

51. Loftis, *supra* note 8, at 22A.

serious water pollution problem due to the volume of fertilizers and pesticides utilized.<sup>52</sup> Water pollution from agricultural activities, which is transported in surface water runoff, has been classified as *non-point source* pollution and is regulated only indirectly by federal law.<sup>53</sup> Control of non-point source pollution is left primarily to the states.<sup>54</sup> Florida's environmental protection law has favored agricultural interests by including exemptions for agricultural runoff in its major water pollution control statutes.<sup>55</sup>

## 2. *Interim Action Plan*

The protection of agricultural interests in the Everglades Agricultural Area (EAA) through state water management policies and practices has led to the deterioration of water quality in the entire Kissimmee River-Lake Okeechobee-Everglades system. Prior to 1979, the excess drainage water from the Everglades Agricultural Area was backpumped into Lake Okeechobee. Concern for the polluted conditions in the lake led to the adoption of an Interim Action Plan (IAP) by the South Florida Water Management District (SFWMD)<sup>56</sup> to minimize the backpumping of nutrient-rich water from the Everglades Agricultural Area north to the lake.

In 1979, the SFWMD implemented the IAP for the management of pump stations in the Everglades Agriculture Area to reduce backpumping to the Lake. Under this plan, the nutrient laden water from the Everglades Agricultural Area is sent south toward the Water Conservation Areas and Ever-

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52. Jurgens, *supra* note 46, at 95.

53. See *infra* pp. 29-40 and accompanying notes.

54. Jurgens, *supra* note 46, at 200, (citing 33 U.S.C. § 128(b)(2)(F) (1982 and Supp. 1985)).

55. FLA. STAT. § 373.406 (2) (1985) prohibits the State Water Management Districts from restraining agricultural water management practices. An implied exemption is recognized in the stormwater regulation by the Districts. FLA. ADMIN. CODE ANN. r. 17-25.03(1)(d) (1986). See also Jurgens, *supra* note 46, for an analysis of additional agricultural exemptions under Florida law.

56. South Florida Water Management District Interim Action Plan (1979), available from the South Florida Water Management District, formerly the Flood Control District.

glades National Park.<sup>57</sup>

The effect of the IAP has been a diversion of "10,200 tons of nitrogen and 258 tons of phosphorus from the Lake south towards the [Water Conservation Areas] and the [Everglades National Park] from 1979-1986, representing a 17% increase in phosphorus loading and a 30% increase in nitrogen loading."<sup>58</sup> Despite the negative impacts of the IAP, it has been approved twice for indefinite continuation by two separate technical committees formed by the state: Lake Okeechobee Technical Advisory Committees, I and II (LOTAC I and LOTAC II).<sup>59</sup> A subcommittee recommendation for continuing with the IAP recognized the negative downstream effects, but stated:

This is a situation of tradeoffs and in the Subcommittee's view, based upon the existing data, the benefits of reducing the phosphorus load to Lake Okeechobee outweigh the negative impacts on the Conservation areas and the Everglades National Park in the short run.<sup>60</sup>

Adverse environmental impacts which were documented for LOTAC II,<sup>61</sup> did not lead to a cessation of the current Interim Action Plan. LOTAC II recommends that the Interim Action Plan continue. The committee's principal finding states that the water pumped from the Everglades Agricultural Area has nutrient effects and hydroperiod changes that are impacting the biological integrity of the native ecosystem of the Everglades marsh in the Water Conservation Areas

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57. *Id.*

58. Scheidt, *supra* note 5, at 11 (citing SFWMD, Board Meeting Minutes (Sept. 1987)).

59. The creation of LOTAC I was requested by the Governor of Florida in August 1985. LOTAC II was created in October 1987 by the Legislature through the Florida Surface Water Improvement and Management (SWIM) Act of 1987, FLA. STAT. § 373.451-373.4595 (1987).

60. Florida Department of Environmental Regulation, Final Report, Lake Okeechobee Technical Committee at 5-7 (Aug. 1986, Rev. Nov. 1986) [hereinafter LOTAC I Report].

61. Lake Okeechobee Technical Advisory Council (LOTAC II), Interim Report to the Florida Legislature 24-26, table 5 (Feb. 29, 1988) [hereinafter LOTAC II Report].

which border the Park. By LOTAC II's own admission "further spread of this impact may be halted by reducing the quantity of water and nutrients entering the marsh."<sup>62</sup> The changes occurring in the Everglades marsh adjacent to points of discharge from the EAA were described as "eutrophication of the marsh."<sup>63</sup>

### 3. *Concerns for the Continued Existence of Everglades National Park*

A recent study conducted in the ENP "indicates that very slight increases in nitrate or phosphate levels change the Everglades marsh ecosystem."<sup>64</sup> Nutrient impacts on the Everglades ecosystem have been documented by the SFWMD<sup>65</sup> in the marshes of two of the Water Conservation Areas and are due to runoff from the EAA. Continuation of the SFWMD's Interim Action Plan may lead to biological changes in the ENP's marsh.<sup>66</sup>

The state of Florida and the SFWMD continue to address the complex problems of water supply but continue to take actions before all environmental impacts of those actions have been fully studied. Protection of the agricultural industry has been a high state priority. State Best Management Practices (BMP) for nonpoint source pollution have been ineffectual in solving the problem of pollution in surface water runoff, and state water quality permit levels for nutrients for Lake Okeechobee have not been met.<sup>67</sup> Yet despite these serious state pollution control problems, representatives from the sugar industry continue to suggest that various wildlife management areas and public lands be used as holding ponds for the polluted runoff.<sup>68</sup>

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62. *Id.* at 8.

63. *Id.* at 23.

64. Scheidt, *supra* note 5, at 1.

65. LOTAC II Report, *supra* note 61, at 24-25, table 5.

66. *Id.* at 23.

67. LOTAC I Report, *supra* note 60, at 2-2.

68. Mulliken, *Sugar Lobby is Sweet on Public Land*, Fort Lauderdale Sun-Sentinel, Dec. 15, 1987, at 7B; Loftis, *Cane Growers Reoffer Idea to End Pollution*, Miami Herald, Dec. 15, 1987, at 24A. These lands consist of state wildlife management areas

The Everglades National Park asserts that their unique water quality standards designed at the request of Congress, and agreed upon by the Army Corps and Engineers and the SFWMD are being violated.<sup>69</sup> Continuation of the Interim Action Plan could lead to irreversible damages to the park's ecosystem. The manipulation and degradation of the park's water supply represents a real and immediate threat to the biotic, natural, and scenic resource values of the Everglades National Park.

### III. Analysis of Federal Legislation

#### A. *Park Enabling Legislation*

The scope of authority of the National Park Service over external activities which pose threats to park lands has not been clearly defined in the statutory language of the 1916 National Park Service Organic Act,<sup>70</sup> the 1978 amendment to the act,<sup>71</sup> or in subsequent litigation.

##### 1. *The 1916 National Park System Organic Act*

Under the 1916 Organic Act, Congress established the national park system<sup>72</sup> and gave the administrative authority for management of the system to the Secretary of the Interior.<sup>73</sup> The statutory purpose of establishing the national park system is "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."<sup>74</sup> Under this provision, the park service has a dual mission which is sometimes contradictory. The National Park Service is to conserve the lands under its authority, as well as

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slated for restoration as recharge areas.

69. Scheidt, *supra* note 5, at 4. See also LOTAC II Report, *supra* note 61, at 24-25, table 5.

70. 16 U.S.C. § 1 (1982 & Supp. 1986).

71. *Id.* § 1a-1.

72. *Id.* § 1.

73. *Id.* §§ 1, 2, 3.

74. *Id.* § 1.

provide for public use and enjoyment.<sup>75</sup> Activities which involve the use of park resources within park boundaries are subject to regulation by the National Park Service.<sup>76</sup> The 1916 Organic Act, however, did not provide any specific language which directly imposes a specific duty on the Secretary of the Interior to protect the parks from external threats.<sup>77</sup>

External threats to national parks have increased greatly since the date of the original Organic Act (1916) due to increased population growth, development, expanded energy needs, and competing uses for existing resources.<sup>78</sup> In 1980, the National Park Service issued a report to Congress entitled *State of the Parks* in which external threats were documented. The ENP listed 41 threats and ranked 13th in the highest number of threats reported.<sup>79</sup> In the 1970's, a serious external threat to a national park led to a legal challenge which sought to impose both a statutory duty and a public trust duty upon the Secretary of the Interior to protect the Redwood National Park. This action was based upon the 1916 Organic Act, the specific park enabling legislation, and the Secretary's public trust obligation.<sup>80</sup>

In *Sierra Club v. Department of Interior*,<sup>81</sup> the Sierra Club claimed that the continued harvesting of timber on lands adjacent to the Redwood National Park threatened to destroy redwood groves within the park by altering streamflow patterns and surrounding vegetation. In overruling the Secre-

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75. *Id.* Although the general organic act provides for this dual mandate, the enabling legislation of the Everglades National Park provides for a stricter mandate of wilderness preservation. 16 U.S.C. § 410(c) (1982 & Supp. 1986).

76. *See, e.g.,* *Organized Fishermen of Fla. v. Andrus*, 488 F. Supp. 1351 (S.D. Fla. 1980) which sustains the Secretary of the Interior's regulations limiting fishing in Everglades National Park.

77. For a discussion of the Park Service's passive role to date, *see* Sax, *Sleeping Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239 (1976).

78. Keiter, *On Protecting the National Parks from the External Threats Dilemma*, 20 LAND AND WATER L. REV. 355 (1985).

79. NATIONAL PARK SERVICE, DEPT. OF INTERIOR, *STATE OF THE PARKS, 1980: A REPORT TO THE CONGRESS* 52 (1980).

80. *See* Hudson, *Sierra Club v. Dep't of the Interior: The Fight to Preserve Redwood National Park*, 7 ECOLOGY L.Q. 781 (1978).

81. 376 F. Supp. 90 (N.D. Cal. 1974).

tary's motion to dismiss, the court held that the Secretary had a legal duty to protect the park's resources. In a second decision, the court reached the merits of the claim and concluded that the Secretary violated his statutory and public trust duties.<sup>82</sup> The court ordered the Secretary to take several actions to protect the park from the "adverse consequences of timbering and land use practices on lands located in the periphery of the Park and on watershed tributaries to streams which flow into the park," and to make a progress report to the court on compliance.<sup>83</sup> In a third action,<sup>84</sup> however, the court dismissed the matter when it held that the Department of the Interior had taken all of the steps it could by complying with the order for progress reports. The court "purged" Interior of "its previously found failure to take steps to exercise and perform duties imposed by 16 U.S.C. § 1 et seq.,"<sup>85</sup> when it determined that congressional legislation or an Office of Management and Budget appropriation request offered the only effective protection available to the park.

## 2. *Amendment to the Organic Act*

The Redwood litigation led to the amendment of the National Park System Organic Act.<sup>86</sup> The language of the amendment appears to strengthen the Secretary of the Interior's mandate for protection of the park:

Congress further reaffirms, declares and directs that the promotion and regulation of the various areas of the National Park system . . . shall be consistent with and

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82. *Sierra Club v. Department of the Interior*, 398 F. Supp. 284 (N.D. Cal. 1975). "The Court concludes that . . . defendants unreasonably, arbitrarily and in abuse of discretion have failed, refused and neglected to take steps to exercise and perform duties imposed upon them by the National park System Act, 16 U.S.C. § 1, and duties otherwise imposed upon them by law." *Id.* at 293.

83. *Id.* at 294.

84. *Sierra Club v. Department of the Interior*, 424 F. Supp. 172 (N.D. Cal. 1976).

85. *Id.* at 175. The Department of the Interior requested that the Department of Justice commence litigation to restrain timber practices which imminently endanger the park. The Court stated that this decision rested upon the Executive.

86. 16 U.S.C. § 1a-1 (1982).



founded in the purpose established by Section 1 of this title, to the common benefit of all the people of the United States. The authorization of these activities shall be construed, and *the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established . . .*<sup>87</sup> [Emphasis added.]

The legislative history of the amendment also indicates that Congress intended to provide greater authority to the Secretary in park preservation. The Senate Report stated that the amendment to the purposes of the original organic act was drafted to clarify the responsibilities articulated in the Organic Act which "may have been blurred" by the Redwood litigation.<sup>88</sup> The legislative purpose of the amendment in the Senate Report states that "the Secretary is to afford the highest standard of protection and care to the natural resources within the Redwood National Park *and the National Park system*."<sup>89</sup> (Emphasis added). This indicates that Congress was looking beyond the Redwood litigation and the additional provisions of the Amendment which focused on the Redwood National Park, to the protection of the entire national park system. The Secretary of the Interior also indicated that the enactment of the amendment would "firmly define the Secretary's duty and authority in Redwood National Park and in the National Park System."<sup>90</sup> Recognizing the "continued pressure" upon the park system, the Secretary agreed that a "restatement and reenforcement" on the basic premises of protection, management and administration was "very appropriate."<sup>91</sup>

The amendment itself, however, was not clear enough in

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87. *Id.*

88. S. Rep. No. 528, 95th Cong., 1st Sess. 13-14 (1977).

89. *Id.*

90. H.R. Rep. No. 581, 95th Cong., 2nd Sess. 3, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 478-79 (1978).

91. *Id.*

its specific language in directly mandating that the Department of the Interior had an affirmative duty to respond to external threats to the parks. This duty can be implied, however, from the specific language in the legislative history which was noted by the court in *Sierra Club v. Andrus*.<sup>92</sup> The Sierra Club sought an order to require the Department of the Interior to take action to "define, assert and protect federal reserved water rights in certain water courses in southern Utah and northern Arizona" from proposed energy projects which would have highly water-intensive uses.<sup>93</sup> It is important to note that at the time the case was filed, no water was being taken out of the streams by the projects,<sup>94</sup> and that the Department was studying the issue of reserved water rights.<sup>95</sup> The court considered these factors when analyzing the statutory duty of the Secretary under the 1978 amendment to the Organic Act, and found that the Secretary had a rational basis for refraining from litigating the reserved water rights issue at this time.<sup>96</sup>

The court noted, however, that the Department had conceded that under the language of the purposes section of the Organic Act, "[t]he Secretary has an absolute duty, which is not to be compromised, to fulfill the mandate of the 1916 Act to take whatever actions and seek whatever relief as will safeguard the units of the National Park System."<sup>97</sup> Under the enabling statute of the park in question, Congress directed that the statutory standards of 16 U.S.C. § 1 be applied in the administration and protection of the Grand Canyon National Park and Glen Canyon National Recreation Area. The court suggested that if a different, more imminently threatening fact pattern were at issue, the Secretary would be required to take appropriate action. The example the court used for the type of threat requiring action by the Secretary was "a real and immediate water supply threat to the scenic, natural, his-

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92. 487 F. Supp. 443 (D.D.C. 1980).

93. *Id.* at 445.

94. *Id.*

95. *Id.* at 451.

96. *Id.* at 452.

97. *Id.* at 448 (quoting S. Rep. No. 528, 95th Cong., 1st Sess. 9 (1977)).

toric, or biotic resource values"<sup>98</sup> of a national park. The court noted that the Secretary is not restricted in seeking protection to any single means, despite the language of 16 U.S.C. §§ 1 and 1a-1 which does not set forth a directive on how the protection of park resources is to be effectuated. Two of the actions suggested by the court which could be brought by the Secretary include asserting reserved water rights and bringing trespass or nuisance actions.<sup>99</sup>

The court then gave specific guidance as to the Secretary's statutory duties.<sup>100</sup> It simply did not find in this case, an "immediate" threat to the alleged federal reserved water rights or the subject water courses. Thus, it can be concluded that the statutory mandate of § 1a-1 has not yet been fully determined in the courts. In applying the above analysis to the immediate threat facing the Everglades National Park, in terms of water supply, and by examining the specific enabling act establishing the park, it can be asserted that the Secretary of the Interior has less discretion, and a stronger statutory mandate to take action in protecting the Everglades National Park.

### 3. *The Everglades National Park Enabling Act*

The Enabling Act for the Everglades, in section 3, provides that the administration, protection and development of the ENP is subject to the statutory standards of 16 U.S.C. § 1.<sup>101</sup> Unlike most of the national parks established by Congress which have a dual mandate of conservation and of providing for public use and enjoyment, the Everglades has a strict statutory mandate which places wilderness preservation above other purposes:

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98. *Id.* at 448.

99. *Id.*

100. The court did not accept the argument that the language of the statute imposed trust duties on the secretary, but the analysis of the court on this issue is questionable. See Wilkinson, *Public Trust in Public Land Law*, 14 U.C. DAV. L. REV. 290-93 (1980). "Like the *Redwood National Park* opinions, *Sierra Club v. Andrus* does not provide a definitive resolution of those public trust issues." *Id.* at 293.

101. An Act to Provide for the Establishment of the Everglades National Park in the State of Florida and for Other Purposes, 48 Stat. 816 (1934).

The said area or areas shall be permanently reserved as a wilderness and no development of the project or plan for the entertainment of visitors shall be undertaken which will interfere with the preservation intact of the unique flora and fauna and the essential primitive natural conditions now prevailing in this area.<sup>102</sup>

Although the enabling statute mandates that the park be established "for the benefit and enjoyment of the people,"<sup>103</sup> Congress prioritized the purposes of this park by including the specific statutory directive of section 4, which elevates the preservation of the park as wilderness to the highest priority. The Secretary of Interior has a clear statutory directive and preservation duty in the case of the Everglades National Park.<sup>104</sup>

#### 4. *The Everglades National Park Enabling Act and Legislative History of the Flood Control Acts*

The statutory directive of the enabling act is not weakened by the Congressional purposes of flood control in south Florida. Both the Flood Control Act of 1948, and the River Basin Monetary Authorization Act of 1970, have legislative histories which show that the water quantity and quality of the ENP's water supply is not to be jeopardized by flood control projects.

In a report to Congress by the Army Corps of Engineers in 1948, the Corps noted the importance of the water needs of the park. "The corps . . . declared that project plans had been developed in full recognition" of the importance of the park and thought that releases of water from conservation storage would help preserve it.<sup>105</sup> The report also included a letter

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102. *Id.* § 4, at 817.

103. *Id.* § 1, at 816.

104. *Id.*

105. COMPREHENSIVE REPORT ON CENTRAL AND SOUTHERN FLORIDA FOR FLOOD CONTROL AND OTHER PURPOSES, H.R. 643, 80th Cong., 2d Sess. 4 (1948). The original purposes of the flood control project as described by the Corps were: flood control, water control, water conservation, prevention of salt water intrusion, preservation of fish and wildlife, improved navigation, and pollution abatement.

from the Department of the Interior who expressed concern that there should "not be too little" water.<sup>106</sup>

The legislative history accompanying the monetary authorization act of 1970 for projects authorized by the Flood Control Act of 1968 which established a minimum water delivery schedule for the park has language which is unmistakably clear. It states that: "[t]he 1968 authorization specifically recognized provision of adequate water supplies to the Everglades National Park as a project purpose, *in order to restore its natural state and to maintain and protect its unique ecology.*"<sup>107</sup> (Emphasis Added).

The Committee Report went on to address problems of water quality in south Florida. It stated that although the language of the authorization act addressed the adequacy of the water supply, "in order to preserve the park's unique ecosystem, it is important that consideration be given to the *quality* of water delivered."<sup>108</sup> (Emphasis Added) The committee requested that the Corps and the National Park Service reach an agreement on measures "to assure that the water delivered to the park is of sufficient purity to prevent ecological damage or deterioration of the park's environment."<sup>109</sup> A report by the Corps was also requested for submission to the Committee on Public Works which was to include measures taken, and any agreements reached between the Corps and the National Park Service. The Park was directed to report upon water quality needs and the extent to which they are being met. Pursuant to these Congressional directives, the Corps, the National Park Service, and the SFWMD entered into an agreement which set forth water quality standards for water delivered to the park from the Lake Okeechobee flood control project.<sup>110</sup>

Although the Flood Control Project has made the drainage of land for agricultural development a priority, the legisla-

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106. *Id.* at VII.

107. S. Rep. No. 895, 91st Cong., 2d Sess. at 16 (1970).

108. *Id.* at 24.

109. *Id.*

110. Interagency Memorandum of Agreement between the U.S. Army Corps of Engineers, South Florida Water Management District, and Everglades National Park (1979).

tive history of the 1948 Act and the 1970 Authorization Act are relevant in determining Congressional intent as to the Everglades National Park. Protection of the park is clearly a priority of the Flood Control Project according to Congress. The project can not be managed to the detriment of the park.

### *B. Applying the Clean Water Act to the Everglades Problem*

The declared national goal of the federal Clean Water Act (CWA) is the elimination of the discharge of pollutants into waters of the United States.<sup>111</sup> The Act, however, primarily addresses the regulation of point source pollution through a permit and water quality standards scheme. A point source is defined as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock concentrated animal feeding operation, vessel, or other floating craft from which pollutants are or may be discharged."<sup>112</sup>

Non-point source pollution is not included in the statutory definitions.<sup>113</sup> Regulations promulgated pursuant to the CWA list exclusions for discharges which do not require National Pollutant Discharge Elimination System (NPDES) permits. These include "any introduction of pollutants from non-point agricultural and silvicultural activities, including runoff from orchards, cultivated crops, pastures, range lands, and forest lands . . . ."<sup>114</sup> In addition, return flows from irrigated agriculture are also specifically excluded.<sup>115</sup>

#### *1. Point Source Pollution*

The NPDES program requires dischargers to disclose the

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111. 33 U.S.C. § 1251 (1982 & Supp. III 1985).

112. 40 C.F.R. § 122.2 (1987).

113. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (quoting former EPA Administrator Costle's Motion to Strike Post-Trial Brief at 2. A non-point source has been defined by the EPA as "nothing more than a pollution problem *not* involving a discharge from a point source"). *Id.* at 166 n. 289.

114. 40 C.F.R. § 122.3(e) (1987).

115. 40 C.F.R. § 122.3(f) (1987).

volume and nature of discharges, authorizes the EPA to specify effluent limitations, imposes an obligation on dischargers to monitor and report compliance or non-compliance, and authorizes enforcement by the EPA for non-compliance. As a result, plaintiffs in various cases have sought to have particular structures or conveyances classified as point sources. Examples of various sources classified by courts as point sources under the CWA are U.S. Navy airplanes dropping bombs,<sup>116</sup> bulldozers and dump trucks engaged in filling wetlands,<sup>117</sup> wastewater treatment spray irrigation systems,<sup>118</sup> and spoil piles which discharge into a navigable water body by means of ditches.<sup>119</sup>

The water management activities of the SFWMD and the Corps have resulted in the construction of a number of water control structures<sup>120</sup> which now deliver a nutrient-laden water supply to the ENP. The classification of some of these structures such as *pump stations* as point sources would be beneficial to the ENP because water quality could be regulated directly at the point of discharge with NPDES permits imposing effluent limitations. The EPA's definitions of point sources and listings of exclusions from the NPDES system and court determinations, however, limit the possibility of EPA point source regulation.

The classification of water control structures as point sources was the subject of litigation in *National Wildlife Federation v. Gorsuch* (National Wildlife I).<sup>121</sup> In *National Wildlife I*, the Wildlife Federation and the state of Missouri sought a declaration that the EPA Administrator violated a nondiscretionary duty by failing to regulate the discharge of pollutants from hydroelectric dams (man-made dams) under

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116. *Romero-Barcelo v. Brown*, 478 F. Supp. 646 (D.P.R. 1979).

117. *United States v. Weismann*, 489 F. Supp. 1331 (M.D. Fla. 1980).

118. *United States v. Oxford Royal Mushroom Products, Inc.*, 487 F. Supp. 852 (E.D. Pa. 1980).

119. *Sierra Club v. Abston Const. Co. Inc.*, 620 F.2d 41 (5th Cir. 1980).

120. The water system consists of over 125 control structures and 1400 miles of canals and levees providing water for agriculture, water supply storage, urban wetfield recharge and maintenance of natural wetlands. Scheidt, *supra* note 5, at 1.

121. 530 F.Supp. 1291 (D.D.C. 1982).

the CWA's NPDES permit program, and sought mandamus or an injunction to compel the EPA to promulgate regulations for dams as a point source category.<sup>122</sup> The issue in *National Wildlife I* was whether "in terms of the statutory definitions in the CWA, the discharge of water of diminished quality from dams constitutes the discharge of one or more pollutants into the navigable waters of the United States from a point source."<sup>123</sup> The EPA had previously classified dams as non-point sources of pollution and argued that the water quality problems caused by dams were being addressed through other mechanisms of the CWA.<sup>124</sup> In *National Wildlife I*, the parties were in agreement that dams (characterized as any structure which impounds water) could be considered to be point sources. Dams have structures which release excess water either by spillway designs, through pipes, locks or irrigation outlets to canals, or over the top of the dam. These structures, according to the district court, clearly fall under the CWA definition of point sources. The EPA interpreted the CWA narrowly arguing that dams should not require discharge permits, but instead should be regulated under state-developed areawide waste treatment management plans under section 208 of the CWA.<sup>125</sup>

The major dispute in *National Wildlife I* focused on whether or not the water quality changes created by dams were pollutants added by dams to navigable waters.<sup>126</sup> The dam-caused pollutants at issue in *National Wildlife I* were sedimentation release, low dissolved oxygen, dissolved minerals and nutrients, water temperature changes, and supersatu-

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122. *Id.* at 1295.

123. *Id.*

124. *Id.* at 1296. The other mechanisms cited by EPA were the regulation of upstream point sources and non-point source areawide waste treatment management plans pursuant to § 208 of the CWA, 33 U.S.C. § 1288 (1982 & Supp. III 1985).

125. 33 U.S.C. § 1288 (1982 & Supp. III 1985).

126. Under the CWA, the "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." The term "pollutant" is defined as dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials . . . heat, wrecked or discarded equipment, rock, sand, silt and industrial, municipal, and agricultural waste discharged into water." *Id.* §§ 1362(12), (6).



ration.<sup>127</sup> The arguments relating to the interpretation of the "addition" of a "pollutant" in *National Wildlife I* are critical to the pump station point source argument which could be made for the ENP. The Wildlife Federation argued for a broad reading of the CWA by contending that any adverse change in water quality from its natural state caused by the dam "involves a pollutant," and that the release of polluted water through the dam into the downstream river constitutes the addition of a pollutant to navigable waters from a point source.<sup>128</sup> The EPA argued that a point source must itself physically "introduce the pollutant into navigable water from the outside world" and that dam-caused pollution "merely passes through the dam from one body of navigable water . . . into another."<sup>129</sup> Although the EPA conceded that all adverse water quality changes are "pollution" as defined in the broad definition of section 502(19) of the CWA,<sup>130</sup> the EPA argued that low dissolved oxygen, cold, and supersaturation were not included in the narrower statutory definition of a pollutant under section 502(6) of the Act.<sup>131</sup> The EPA admitted, however, that sediment is a pollutant, although not clearly listed in the definition under section 502(6).

The language of the CWA and its legislative history did not address the specific issues presented in *National Wildlife I*. In ruling in favor of the Wildlife Federation as to the more expansive meaning of both "addition" and "pollutant," the district court relied on Congress' expressed broad goal of the CWA which is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters,"<sup>132</sup> with an interim goal of fishable and swimmable water by 1983, and the total cessation of discharge of pollutants by 1985. The EPA was ordered by the district court to establish "effluent limitations or other performance standards for dams on a categori-

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127. 530 F. Supp. at 1297-1303.

128. *National Wildlife II*, 693 F.2d at 165.

129. *Id.*

130. 33 U.S.C. § 1362(19) (1982 & Supp. III 1985).

131. *Id.* § 1362(6).

132. *Id.* § 1251(a), 530 F. Supp. at 1304-06.

cal, as opposed to a case-by-case, basis.”<sup>133</sup> The EPA appealed the declaration and order of the district court.<sup>134</sup> The district court ruling as to the interpretation of “addition” and “pollutant” was reversed.<sup>135</sup>

In *National Wildlife II*, the U.S. Court of Appeals, District of Columbia Circuit, stated that five elements must be present in order to require NPDES permits for dams: “(1) a *pollutant* must be (2) *added* to (3) *navigable waters* (4) *from* (5) a *point source*.”<sup>136</sup> On appeal, the issues disputed were whether dissolved oxygen, cold, and supersaturation were “*pollutants*,” and whether the water quality problems created by dams constitute the addition of a pollutant from a point source.<sup>137</sup>

The statutory interpretation arguments made in the lower court as to the addition of a pollutant were repeated by the parties, and the EPA argued in addition that the district court had failed to give sufficient deference to the agency’s interpretation of the Act. In the EPA’s view, water pollution causes and controls should be regulated in two categories: point sources of pollutants under the NPDES permit system, and non-point sources of pollution regulated by the states with areawide waste treatment management plans. The Court of Appeals reversed the district court ruling by according great deference to the EPA’s statutory interpretations of the “addition” of “pollutants” and the EPA’s characterization of dams as non-point sources, finding that that EPA’s interpretation was reasonable and not inconsistent with the legislative purposes of the CWA.<sup>138</sup>

The EPA’s view that “the point or nonpoint character of pollution is established when the pollutant first enters navigable water,” and that the character of pollution as point or non-point does not change as it later passes through a dam from one body of water to another was upheld by the Court of

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133. 530 F. Supp. at 1314.

134. 693 F.2d 156 (D.C. Cir. 1982).

135. *Id.*

136. *Id.* at 165.

137. *Id.* at 160.

138. *Id.* at 171.

Appeals.<sup>139</sup> In citing language of legislative history of the CWA, the court found that Congress had intended to distinguish between point sources which would be subject to direct federal legislation, and non-point sources which were specifically reserved to the states and local governments through the section 208 program.<sup>140</sup> Certain pollution problems were to be left to the states, at least for the time being. "Section 208, . . . may not be adequate. It may be that the States will be reluctant to develop [adequate] control measures . . . and it may be that some time in the future a Federal presence can be justified and afforded."<sup>141</sup>

The court also cited section 101(g)<sup>142</sup> for a specific indication "that Congress did not want to interfere any more than necessary with state water management, of which dams are an important component."<sup>143</sup> The provision cited, however, relates only to water quantity and not quality. "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superceded, abrogated, or otherwise impaired by this [Act]."<sup>144</sup> The court used this section to imply that if Congress had been confronted with the issue of whether or not to control dams, Congress would "have decided to leave control of dams insofar as they affect water *quality* to the states."<sup>145</sup>

The analysis of the *National Wildlife II* court as to the EPA's classification of dams as non-point sources, and the EPA's interpretation of the terms of "addition" and "pollutant" is important to the possible argument that pump stations managed by the SFMCD should be classified as point sources under the CWA. Although pump stations which aid in water drainage are distinguishable from dams which impound water, pump stations are one component of a larger state water management program which utilizes a dike at Lake

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139. *Id.* at 175.

140. *Id.* at 176.

141. *Id.*

142. 33 U.S.C. § 1251(g) (1982 & Supp. III 1985).

143. 693 F.2d at 178.

144. 33 U.S.C. § 1251(g) (1982 & Supp. III 1985).

145. 693 F.2d at 179.

Okeechobee. Lake Okeechobee receives phosphate and nitrate from sewage plants and agricultural runoff which are non-point sources that are exempted from the permit program. Water quality in the lake is managed under Section 208 Best Management Practices.<sup>146</sup> Florida's Best Management Practices have not protected Lake Okeechobee from eutrophication.<sup>147</sup>

Fertilizers and pesticides in agricultural runoff from the Everglades Agricultural Area south of the lake further degrade the water in the Flood Control Project. Prior to 1979, drainage from the Everglades Agricultural Area was backpumped north to Lake Okeechobee. In 1979, the water district greatly reduced backpumping due to pollution concerns for the lake. The drainage water from the Everglades Agricultural Area is now being pumped south to the Water Conservation Areas. The agricultural runoff from the agricultural area is no longer being diluted by waters in the lake. This has resulted in increased nutrient loadings in waters which supply the Park. Although this new diversion scheme may result in the "addition" of pollutants, the agricultural runoff and irrigation return flows creating the "addition" are exempt from the permit program. Thus, the CWA's point source pollution regulatory system is ineffectual in providing federal protection to the water quality of the Park's water due to statutory exemptions, EPA's interpretation of the Act, and the *National Wildlife II* court's deference to the agency.

## 2. *Non-point Source Pollution Control Under the CWA*

The EPA non-point source pollution control program under the CWA has also been ineffectual in protecting the quality of water in the Kissimmee River-Lake Okeechobee-Everglades hydrologic unit. Under section 208 of the CWA, states were to identify non-point sources of pollution and develop individual plans for non-point source control.<sup>148</sup> The EPA retained the authority to review and disapprove of inad-

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146. Jurgens, *supra* note 46, at 197 n.14.

147. *Id.*

148. 33 U.S.C. § 1288(b)(2) (1982 & Supp. III 1985).

equate state plans.<sup>149</sup>

Although the Florida Department of Environmental Regulation published a manual of management practices for agricultural activities in 1978 pursuant to a federal directive,<sup>150</sup> the implementation of an effective regulatory program has not yet taken place due to insufficient funding, an insufficient data base for defining permit parameters, and enforcement problems.<sup>151</sup> The Florida Legislature has found that point and non-point source pollution are causing the decline of the State's surface waters.<sup>152</sup>

Recognizing that non-point source pollution could no longer be ignored, Congress, in its 1987 Amendments to the Clean Water Act, called for a more comprehensive effort in non-point source pollution control. Section 316 requires that states prepare an assessment report and a management program for non-point source pollution for submission to the EPA. The management program is to include the identification of measures to control non-point pollution, identification of programs to implement the measures, certification that state laws have adequate authority to implement the program, identification of funding sources for non-point source pollution control, and a schedule for expeditious implementation of the program. States are to target geographic areas where need is most urgent; partial funding will be available for state management implementation costs. States are not certain as to the funding under this program, and the EPA told a group of state officials that "the state clean water strategy was designed with funding constraints in mind."<sup>153</sup> Although the EPA also asserts that the states should be able to achieve significant water quality improvements by targeting control ef-

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149. *Id.* § 1313(e)(3).

150. STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL REGULATION, *NON-POINT SOURCE MANAGEMENT - A MANUAL OF REFERENCE PRACTICES FOR AGRICULTURAL ACTIVITIES* (1978).

151. Jurgens, *supra* note 46, at 211.

152. FLA. STAT. § 373.451 (1987). The Florida Surface Water Improvement and Management Act calls for new plans and programs for surface water improvement.

153. BUREAU OF NATIONAL AFFAIRS, *SPECIAL REPORT ON 1987 AMENDMENTS TO THE CLEAN WATER ACT* 42 (1987).

forts to geographic areas where the need is most urgent, without funding and a stronger federal enforcement mechanism, it is not likely that the new non-point source program will bring about any significant changes in the near future.

### C. *Rivers and Harbors Act*

The analysis of the Clean Water Act results in a conclusion that the Act is ineffectual when applied to the factual situation existing in the Kissimmee River-Lake Okeechobee-Everglades watershed. Another potential mechanism to be utilized in combating the degradation of water quality of the Everglades water supply is section 13 of the Rivers and Harbors Act, which is also known as the Refuse Act.<sup>154</sup> Section 13 reads in pertinent part:

It shall not be lawful to throw discharge, or deposit, or cause, suffer or procure to be thrown, discharged, or deposited from . . . the shore, wharf, manufacturing establishment or mill of any kind, *any refuse matter of any kind or description whatever* other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or . . . into any tributary of any navigable water from which the same shall float or be washed into such navigable water. . . .<sup>155</sup> [Emphasis added.]

The Rivers and Harbors Act has potentially a broader scope of regulation than the Clean Water Act. The term "refuse" under section 13 has been interpreted very broadly by the Supreme Court to include all foreign substances apart from those specifically excepted in the statute.<sup>156</sup> The only exemption in the statute is refuse flowing from streets and sewers and passing therefrom in a liquid state. Further, the word "refuse" does not demand that a material must have been deliberately thrown away, it is satisfied by anything that has be-

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154. 33 U.S.C. § 407 (1982).

155. *Id.*

156. *United States v. Standard Oil*, 384 U.S. 224 (1966).

come waste, however useful it may earlier have been.<sup>157</sup>

Although there are no reported cases on the application of this statute to agricultural fertilizers and pesticides in runoff, the interpretations of "refuse" to date appear to be broad enough to reach agricultural pollution in runoff which is not prohibited under the Clean Water Act. Because non-point source pollution is to be regulated by the states under the Best Management Practices pursuant to section 208 of the CWA, an issue exists as to whether *Best Management Practices* under the Clean Water Act is a comprehensive regulatory scheme which would preclude application of the Rivers and Harbors Act. *Best Management Practices* has been ineffectual in addressing the exorbitant amounts of phosphates and nitrates being dumped into the Water Conservation Areas and canals from the Everglades Agricultural Area. They have been ineffective in preventing the eutrophication of Lake Okeechobee, and Florida State Water Quality Standards for nutrients have been exceeded. Therefore, it seems inaccurate to state that *Best Management Practices* under the CWA represents a comprehensive regulatory scheme in place.

Under section 13 of the Rivers and Harbors Act, it is illegal to discharge refuse into navigable waters and tributaries without a permit from the Army Corps of Engineers. The Chief of the Corps has discretion in the issuance of permits.<sup>158</sup> The permits are to prescribe limits and conditions, and violation of the limits and conditions is a criminal offense.<sup>159</sup> Enforcement of the Act is entrusted to the Department of Justice.<sup>160</sup> When the Justice Department declines to sue, courts have held that private parties cannot sue under section 13 or seek to enjoin violations.<sup>161</sup> Thus, courts have held that Congress has not authorized "private attorney-general" type of

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157. *United States v. Ballard Oil Co., Inc.*, 195 F.2d 369 (1952).

158. Comment, *The Refuse Act of 1899: Its Scope and Role in Control of Water Pollution*, 1 *ECOL. L.Q.* 173, 175 (1971).

159. See, Penalty provisions prescribed in Section 16, 33 U.S.C. § 411 (1982).

160. 33 U.S.C. § 413 (1982 & Supp. III 1985).

161. See, e.g., *National Sea Clammers Association v. City of New York*, 616 F.2d 1222 (3d Cir. 1980); *New York v. United States*, 620 F. Supp. 374 (E.D.N.Y. 1985); *Parsell v. Shell Oil Co.*, 421 F. Supp. 1275, *aff'd*, 573 F.2d 1289 (2d Cir. 1976).

enforcement under the Rivers and Harbors Act. The Department of Justice makes prosecutorial decisions under the Act, taking into account the effects of other federal water quality legislation. The Clean Water Act does not restrict "any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief."<sup>162</sup> It appears that although section 13 is not superceded by the Clean Water Act, the Justice Department takes a very narrow approach to the use of the Refuse Act. The department guidelines for litigation under the Act suggest that "very few actions, will be instituted under it against polluters even though they are violating the quality standards set under the Water Quality Act,"<sup>163</sup> and that the Act would be used primarily for accidental or infrequent significant discharges which are not of a continuing nature.<sup>164</sup>

Thus, although the Refuse Act has a potentially broader scope to address pollution problems which are exempted under the point source program of the Clean Water Act, the use of the Act lies in the discretion of the Justice Department. Existing policies of that department currently prevent the use of this tool in addressing the Everglades problem.

#### D. *Wilderness Act*

In 1978, approximately 1.3 of the 1.4 million acres of Everglades National Park were designated by Congress as a wilderness,<sup>165</sup> pursuant to the Wilderness Act of 1964.<sup>166</sup> The Act provides for the creation of wilderness areas, and establishes standards for their management. The standard to be utilized in managing wilderness areas is non-impairment. The areas are to be left unimpaired for future use and enjoyment as wilderness. Protection of the areas and preservation of their wilderness character reflect the intent of Congress as set

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162. 33 U.S.C. § 1365 (1982).

163. Comment, *supra* note 158, at 201.

164. *Id.*

165. 92 Stat. 3467, 3490 (1978).

166. 16 U.S.C. §§ 1131-1136 (1982 & Supp. IV 1986).



forth in the Act's policy statement.<sup>167</sup> A wilderness is defined in the Act as "an area where earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain" and as "an area of underdeveloped Federal land retaining its primeval character and influence . . . ."<sup>168</sup> Although regulations pursuant to the Act govern the management of wilderness areas, the Act itself does not directly provide authority to estop conflicting or threatening external activities. The designation of the ENP as a wilderness area, however, provides additional evidence of Congressional intent regarding the preservation of the park. "It is generally agreed that wilderness designation provides the greatest assurance under present federal law that the included land will be immune from development or alteration by human activities."<sup>169</sup>

Preservation of wilderness requires protection of water resources. In litigation concerning federal implied water rights for wilderness areas in Colorado, the court noted that the essential purpose of the Wilderness Act would be entirely defeated if wilderness areas did not have access to requisite water. The court stated that "[i]t is beyond cavil that water is the lifeblood of the wilderness areas. Without water, the wilderness would become deserted wastelands. In other words, without access to the requisite water the very purposes for which the Wilderness Act was established would be entirely defeated."<sup>170</sup>

The court went on to hold that federal reserved water rights exist in previously unappropriated water in the wilderness areas of Colorado to the extent necessary to accomplish the purposes of the Wilderness Act.<sup>171</sup> The court further found that the administering agency of the wilderness areas had a statutory duty under the Act to protect wilderness

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167. *Id.* at § 1131(a).

168. *Id.* at § 1131(c).

169. Keiter, *On Protecting the National Parks from the External Threats Dilemma*, 20 LAND & WATER L. REV. 384 (1985).

170. *Sierra Club v. Block*, 622 F. Supp. 842, 862 (D. Colo. 1985) [hereinafter *Sierra Club II*].

171. *Id.*

water resources.<sup>172</sup>

Statutory duties for the administering agency were found to exist under the Wilderness Act to protect the resources of designated wilderness areas.<sup>173</sup> The extent of that duty, and the methods to be utilized in doing so, have not yet been fully determined. The ENP has established water quality standards with the Corps and the SFWMD to preserve the high quality of the park's water which is necessary to sustain the park's fragile ecosystem. The ENP's designation as a wilderness area adds further support for assuring that the water delivered to the park is of sufficient purity to prevent ecological damage or deterioration.

#### E. *National Environmental Policy Act*

An analysis of the National Environmental Policy Act (NEPA)<sup>174</sup> and its relationship to the SFWMD's implementation of its Interim Action Plan may reveal that the mandates of NEPA have been violated. NEPA requires that environmental impact statements be prepared for all major federal actions which significantly affect the quality of the human environment.<sup>175</sup>

The first question to be addressed is whether the new water diversion plan under the IAP is a major federal action. Although the decision to implement the plan was made by a state agency, federal agencies may be required to prepare impact statements on state projects when they are "federalized" through a federal "nexus."<sup>176</sup> Guidance is given in the Council on Environmental Quality's NEPA regulations as to what constitutes a "major federal action."<sup>177</sup> "Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated or approved by federal agencies . . . ." Thus, federal funding, permitting,

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172. *Id.* at 866-67.

173. *Id.* See also *Sierra Club v. Lying*, 661 F. Supp. 1490 (D. Colo. 1987).

174. 42 U.S.C. §§ 4321-4370 (1982 & Supp. IV 1986).

175. *Id.* § 4332(2)(c).

176. D. MANDELKER, *NEPA LAW AND LITIGATION* § 1:04 (1984).

177. 40 C.F.R. § 1508.18(a) (1987) (defining "major federal action").

regulating or assisting in state projects could be sufficient for characterizing a state action as federal.

The SFWMD has authority under state law to manage the water resources and maintain the network of the Central and South Florida Flood Control Project which was a federal project established and built by the U.S. Army Corps of Engineers.<sup>178</sup> In doing so, the SFWMD must follow operating procedures established by the Corps.<sup>179</sup> In appropriating \$70.3 million dollars for additional improvements to the Flood Control Project in 1970, Congress directed the Corps to supply a minimum allotment of water to the ENP.<sup>180</sup> In 1984, the District, the Park, and the Corps adopted a water delivery plan named by the District as the "Rainfall Plan" to address water delivery problems created by the project.<sup>181</sup> The Corps, the Park, and the District signed an interagency Memorandum of Agreement in 1979 adopting water quality standards for water delivery to the ENP pursuant to a federal directive.<sup>182</sup> A new modified water delivery plan for the ENP involving re-distribution of water deliveries from the Water Conservation Areas and establishing a variable schedule of delivery is the subject of a Draft Environmental Impact Statement by the Corps.<sup>183</sup>

The Corps provides assistance to the SFWMD in the operation of the flood control project. The District is subject to the operating regulations of the Corps. The interaction between the Corps and the flood control project and the District as described above creates a federal "nexus." The decision to

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178. 33 U.S.C. §§ 701-709(a) (1982). The funding for the initial construction of the project was a mix of federal and local funds. The original funding plan proportioned funding according to federal and local interests. Flood control, navigation, and preservation of fish and wildlife were characterized as federal benefits. Increased land use was considered to be the local benefit. The federal share was to be sixty-one percent, and the local share was thirty-nine percent. Actual funding in the 1950's resulted in the local share being 59.6%. MALONEY, *supra* note 1, at 303-04.

179. Telephone conversation with John Moulding, Environmental Studies, U.S. Army Corps of Engineers, Jacksonville, Florida (Apr. 20, 1988).

180. River Basin and Monetary Authorizations Act of 1970, *supra* note 49.

181. SOUTH FLORIDA WATER MANAGEMENT DISTRICT, A CLOSER LOOK: "THE RAINFALL PLAN" RESTORING A NATURAL BALANCE 5 (undated).

182. Scheidt, *supra* note 5, at 4.

183. 51 Fed. Reg. 30,528 (1986) (At the time of this writing, the DEIS has not been completed).

reduce backpumping to the lake and divert the runoff from the EAA to the Water Conservation Areas can be characterized as a major federal action which required the preparation of an environmental impact study by the Corps.

In analyzing the next requirement of NEPA in determining whether an environmental impact statement is to be prepared it must be determined whether the action significantly affects the quality of the human environment. Documentation exists in the form of reports by the Lake Okeechobee Technical Advisory Councils, which set forth various significant effects on the environment.<sup>184</sup> A significant effect exists even if the "agency believes that on balance the effect will be beneficial,"<sup>185</sup> e.g., protecting Lake Okeechobee. Adverse effects have also been documented by the South Florida Water Management District.<sup>186</sup>

The alternatives to the Interim Action Plan are being considered in a piecemeal fashion. For example, the Corps was requested to prepare an environmental impact study for an alternative water diversion plan.<sup>187</sup> The Corps is also currently compiling a draft environmental impact study for a Modified Water Delivery System for Everglades National Park which will address water supply distribution and quality problems.<sup>188</sup> This leads to a consideration of whether a segmentation issue arises under NEPA. A segmentation problem can arise when an agency proposes geographically related actions, but breaks these actions down into segments, and

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184. *Supra* notes 60 and 61.

185. 40 C.F.R. § 1508.27(b)(1)(1987).

186. See LOTAC II Report, *supra* note 61.

187. Conversation with J. Moulding, U.S. Army Corps of Engineers, Jacksonville, Florida (Apr. 20, 1988). See also LOTAC I, Final Report (Aug. 1986 rev. Nov. 1986). In a Memorandum of Understanding Between Florida state agencies, the agencies agreed to the following:

As local sponsor of the Central and Southern Florida Flood Control Project, request the Corps of Engineers to initiate a general design memorandum and *environmental impact statement* for the Taylor Creek-Nubbin Slough diversion, to include as a separable project feature interconnection with the S-133 and S-135 basins. (Emphasis added). LOTAC I, *supra* note 60, at Appendix VII, 8.

188. 51 Fed. Reg. 30,528 (Aug. 27, 1986).

prepares an environmental impact study on each segment.<sup>189</sup> Segmentation relates to the proper scope of an environmental impact study. The scope of an impact study is the range of actions, alternatives, and impacts which are to be considered in a study.<sup>190</sup> Connected actions are to be discussed in the same impact statement. The environmental consequences of the Interim Actions Plan should have been evaluated in one environmental impact study so that all of the alternatives could be considered in a comprehensive manner.<sup>191</sup>

The water district's Interim Action Plan has become a long-term water management strategy. The full impacts of this plan and alternatives to it have not been addressed in an environmental impact study pursuant to NEPA. The mandates of NEPA are being violated on an ongoing basis. NEPA's procedural requirements can still be applied in a manner that would usefully achieve its statutory purposes. The National Park Service, as a federal agency, had no role in the plan which is threatening and altering the ENP's water supply. Under the CEQ regulations, the agency could have requested participation in the environmental impact study process as a cooperating agency.<sup>192</sup> The Park Service was unable to participate in the NEPA process or the scoping process and was not permitted to provide environmental analysis on issues on which the Park Service has special expertise because an environmental impact study was never done. If a court were to utilize its equitable discretion by fashioning a structural injunction, the Park Service could participate in the process to assure that all relevant alternatives, negative impacts, and mitigation measures are considered.

#### IV. Analysis of Common Law Doctrines

##### A. *The Public Trust Doctrine*

The public trust doctrine has its origin in Roman and

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189. Mandelker, *supra* note 176, at § 9.01.

190. 40 C.F.R. § 1508.25 (1987).

191. *Id.* at § 1508.25(a)(3).

192. 40 C.F.R. § 1501.6 (1987).

English law; the Institutes of Justinian recognized that certain resources by the law of nature are common to man, and therefore, incapable of private ownership. These included "the air, running water, the sea and consequently the shores of the sea."<sup>193</sup> Under English common law, the doctrine was used as a restriction upon the Sovereign by prohibiting the alienation of the beds of tidal waters. Although the Crown was considered to own these areas, ownership could not be transferred or separated from the Sovereign because the public enjoyed the rights to the use of these areas for navigation, fishing and commerce.<sup>194</sup>

The American doctrine was influenced by these origins, but its development has not been restricted by them. Although the early American cases focus on the use of the public trust doctrine to protect the historic public rights of navigation, commerce, and fishing by preventing the alienation of submerged lands or the granting of private property interests in navigable waters,<sup>195</sup> the doctrine has been utilized by courts more recently to support judicial decisions whose purpose has been to protect natural resources from degradation or destruction.<sup>196</sup>

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193. INSTITUTES OF JUSTINIAN 2.1.1 (S. Scott trans. reprinted ed. 1973).

194. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 476 (1970).

195. *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387 (1892). An express conveyance of trust lands was held to be beyond the power of a state legislature. The Court stated that the title under which the state of Illinois held the navigable waters of Lake Michigan is:

different in character from that which the State holds in lands intended for sale. . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.

*Id.* at 452.

196. See, e.g., *Gould v. Greylock Reservation Comm'n*, 35 Mass. 410, 215 N.E.2d 114 (1966) (public trust used to invalidate an agreement between a tramway authority and a private ski area developer); *Muench v. Pub. Serv. Comm'n*, 261 Wisc. 492, 53 N.W.2d 514, *aff'd on rehearing*, 261 Wisc. 515c, 55 N.W.2d 40 (1952) (public trust used to invalidate the issuance of a permit by a public service commission for the construction of a dam); *National Audubon Society v. Super. Ct. of Alpine County*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 464 U.S. 977 (1983) (public trust doctrine used to "protect navigable waters from harm caused by diversion of

In American law the public trust doctrine has been used to impose a rigorous standard upon governmental activities dealing with certain resources. The trust can be characterized as comprising two duties: the government's general obligation to act for the public benefit, and a special, more demanding obligation of the state as trustee of certain public resources.<sup>197</sup> The state has a duty as trustee of state waters. The state is limited in its disposition and management of particular resources because the state holds these resources in trust for the public, and must manage the resources consistent with the trust. "When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to allocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties."<sup>198</sup> This principle has been characterized as "the central substantive thought in public trust litigation."<sup>199</sup>

Various jurisdictions are relying upon the public trust doctrine to address public interests in waters and water-related lands. An analysis of certain state court decisions is instructive in determining the application of a public trust argument for the protection of the ENP's water supply. The doctrine was applied in one jurisdiction to hold a statute unconstitutional, because the legislature had delegated control over the public trust of the whole state to local county boards. In *Muench v. Public Service Commission*,<sup>200</sup> a private power company was given permission by a public service commission to build a dam on the Namekagon River. The power company obtained approval for the project from a local county board

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non-navigable tributaries"); *Matthews v. Bay Head Improvement Association*, 95 N.J. 306, 471 A.2d 355, *cert. denied*, 469 U.S. 821 (1984) (public trust extended to permit public use of non-public dry sand beach areas for bathing, swimming, and other shore activities); *Montana Coalition for Stream Access, Inc. v. Hildreth*, 211 Mont. 29, 684 P.2d 1088 (1984) (public trust used to uphold the recreational use of surface waters flowing over privately-owned streambeds).

197. *Sax*, *supra* note 194, at 478 (1970).

198. *Id.* at 490 [Emphasis in original].

199. *Id.* at 514, 53 N.W.2d at 524.

200. 261 Wisc. 492, 53 N.W.2d 514, *aff'd on rehearing*, 261 Wisc. 515c, 55 N.W.2d 40 (1952).

located at the proposed dam site.<sup>201</sup> Under a Wisconsin statute, the local county board's approval of the project precluded the Public Service Commission's consideration of the effect of the dam on public rights to the enjoyment of fishing, hunting or natural scenic beauty. Therefore, the Public Service Commission had made no finding on the effects of the project on public rights to fishing, hunting and scenic beauty.<sup>202</sup> The statute reads in pertinent part:

[I]n [the] case of a dam or flowage located outside the boundaries of a state park or state forest no permit shall be denied on the ground that the construction of such proposed dam will violate the public right to the enjoyment of fishing, hunting or natural scenic beauty if the county board . . . by a two-thirds vote approve the construction of such dam.<sup>203</sup>

The court held that the public trust is a matter of statewide concern, and authority over it could not be delegated to a local board.

In *Muench*, the court found that the Wisconsin legislature had given local county boards authority to make resource use decisions, which in effect would subordinate broad public resource uses to private interest uses. The application of the public trust doctrine was used by the court in recognizing "that trust lands are of statewide concern and that authority to deal with them cannot be delegated by the state legislature to any group which is less broadly based."<sup>204</sup>

This use of the public trust doctrine can be applied to the Everglades problem. The state of Florida has given authority to the SFWMD to make decisions concerning resource uses of the waters of Lake Okeechobee. In making these decisions, the District has favored the private interests of agriculture. These private interests have been favored, and the public interests in maintaining the biological integrity of the native

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201. *Id.* at 493, 53 N.W.2d at 515.

202. *Id.*

203. *Id.* at 514, 53 N.W.2d at 524 citing WIS. STATS. § 31.06(3) (1949).

204. Sax, *supra* note 194, at 523.



ecosystem of the Everglades Marsh, the Water Conservation Areas, and the ENP have been subordinated to agricultural interests. It has now become apparent that the Florida legislature has reconsidered its broad delegation of authority to the District through its enactment of the Surface Waters Improvement and Management Act (SWIM Act) which directs the state water management districts to design and implement plans and programs to improve water quality in surface waters.<sup>205</sup>

The state of Florida recognizes that the SFWMD's Interim Action Plan of water diversion is destroying the south Florida ecosystem and that it is a crisis of immediate concern.<sup>206</sup> The SWIM Act created a second Lake Okeechobee Technical Advisory Council to make findings and recommendations for permanently eliminating the adverse environmental effects caused by the diversion.

The findings of the legislature recognize the state's public trust duty in the preservation of the state's surface waters:

The Legislature finds that the declining quality of the state's surface waters has been detrimental to the *public's right to enjoy these surface waters and that it is the duty of the state*, through the state's agencies and subdivisions, to enhance the environmental and scenic values of surface waters.<sup>207</sup> [Emphasis added].

Further, the act specifically states that the South Florida Water Management District "shall not divert waters to . . . Everglades National Park, in such a way that the state water quality standards are violated, [and] that the nutrients in such diverted waters adversely affect indigenous vegetation communities or wildlife . . ."<sup>208</sup>

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205. FLA. STAT. §§ 373.451(6), 373.453(2) (1988).

206. "The Legislature finds that efforts to reduce nutrient levels in Lake Okeechobee have resulted in diversion of nutrient-laden waters to other environmentally sensitive areas, which diversions have resulted in adverse environmental effects." *Id.* § 373.4595(2)(a). "[T]his crisis must be addressed immediately." *Id.*

207. FLA. STAT. § 373.451(3).

208. *Id.* § 373.4595(2)(a)(1).

Despite the fact that Florida expressly recognizes its public trust duty in the environmental integrity of state surface waters, the Water Conservation Areas, and the Park, the District's pumping of nutrient-laden water continues. Agriculture is still permitted to dispose of its waste into state waterworks and surface waters. The public trust doctrine should be utilized by the federal government or in a third party action to prevent the continued degradation of the state's surface waters, and to prevent the destruction of the Park's ecosystem.

A second type of application of the public trust doctrine to address water diversions which infringe upon the values protected by the doctrine is seen in California's *Mono Lake* litigation.<sup>209</sup> The public trust doctrine was applied to protect navigable waters from harm caused by the diversion of non-navigable tributaries. The California Supreme Court attempted to clarify the state's responsibilities under the public trust in the face of conflicting values of water use. Mono Lake's ecological balance was being seriously compromised by water diversions of the lake's fresh water feeder streams.

The State Water Board has authority to allocate water uses, and in doing so, must balance competing beneficial uses and their impact upon the public welfare. An appropriator can seek a permit from the Board, and the Board is required to take instream values as well as consumptive uses into account when considering permit approval. The City of Los Angeles' diversions were pursuant to decrees issued by the State Water Board since 1941. In 1979, the city's increased diversion, coupled with the fact that the volume of the lake had been reduced by one-half and its surface area reduced by one-third, resulted in litigation by the National Audubon Society for injunctive and declaratory relief. The plaintiffs claimed that the state had a duty to protect public trust interests; public rights in the waters of the lake are protected by a public trust administered by the state. Defendants claimed that the public trust doctrine had been "subsumed" into the state's appropriative water rights system.

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209. *National Audubon Society v. Super. Ct. of Alpine County*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, cert. denied, 464 U.S. 977 (1983).

The court held that the state, as sovereign, had an affirmative duty to consider the effect of diversions on public trust interests, and to protect those interests whenever feasible.<sup>210</sup> The clash of values in the *Mono Lake* litigation are similar to those of south Florida. Mono Lake is a scenic and ecological treasure of national significance. The lake was imperiled by continued diversions of water, yet, the court had to recognize the city's need for water and its reliance on rights which were granted to it by the State Water Board. The court held that the state's sovereign control over navigable waters pursuant to the public trust doctrine prevents any party from "acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust."<sup>211</sup>

In dicta, the court noted that the state is not confined by past allocation decisions "which may be incorrect in light of current knowledge or inconsistent with current needs."<sup>212</sup> The court was concerned with the fact that the legislature, the water board or any judicial body had never determined the impact of the water diversion, nor weighed the needs of the city with the needs of the lake to find if "the benefit gained is worth the price."<sup>213</sup> The court believed that "[t]he human and environmental uses of Mono Lake - uses protected by the public trust doctrine - deserve to be taken into account. Such uses should not be destroyed because the state mistakenly thought itself powerless to protect them."<sup>214</sup>

The *Mono Lake* litigation recognizes that the protection of public trust values are to be taken into account by a state when considering water use allocations. The state cannot completely abdicate its public trust responsibilities to a state agency when important resources are affected. Florida recognizes its public trust duties to state surface waters and the Everglades National Park. The state also recognizes these resources are being destroyed by the current water pumping

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210. 189 Cal.Rptr. at 364.

211. *Id.*

212. *Id.* at 365.

213. *Id.*

214. *Id.* at 369.

plan. The principal finding of the legislature's Lake Okeechobee Technical Advisory Council regarding the Everglades ecosystem is that:

[N]utrient effects and hydroperiod changes caused by water pumped from the Everglades Agricultural Area are impacting the biological integrity of the native ecosystem of Everglades marsh in Water Conservation Areas 1, 2 and 3. Left unchecked, these effects could spread over large portions of the Water Conservation Areas and eventually into the marsh within Everglades National Park. These natural areas are of statewide, national and international significance.<sup>215</sup>

Although the state of Florida recognizes a public trust duty in relation to the protection of its surface waters, and the Park's water supply has been labeled by the legislature as a crisis, the state continues to allow the District's Interim Action Plan to be employed. The Interim Action Plan permits the agricultural industry to dispose of its waste into waters protected by the public trust, and continues to allow the water district to divert water in a harmful manner. The state calls for further studies while the destruction of the Everglades marsh continues to advance.

The state not only has a duty to "enhance the environmental and scenic value of [its] surface waters,"<sup>216</sup> it also has a duty to protect the Everglades National Park. The establishment of the Park "represents the concerns and collective will of a state and its citizens. The people of the State of Florida donated over 850,000 acres and 2 million dollars to fulfill the promise of an Everglades National Park."<sup>217</sup> The specific wilderness preservation mandate of the Park's enabling legislation provides the highest standard for the management of the Park. Because of the park's unique flora and fauna and the essential primitive natural conditions of the area, the park

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215. LOTAC II Report, *supra* note 61, at 5.

216. FLA. STAT. § 373.451(3) (1987).

217. Statement of Michael V. Finley, Superintendent, Everglades National Park, Before the South Florida Water Management District Board 1 (Sept. 10, 1987).

is to be "permanently reserved as a wilderness."<sup>218</sup> The South Florida Water Management District declares that its Mission "is to manage water and related resources for the benefit of the public" and the key elements of the Mission are: "*environmental protection and enhancement, water supply, flood protection, and water quality protection.*"<sup>219</sup> [Emphasis added]. This stated Mission does not appear to be contradictory to the values protected by the public trust. Yet, the District and the state of Florida are currently violating the trust.

### B. *Federal Power to Enjoin a Public Nuisance*

The manipulation and degradation of the Park's water supply is destroying its character and jeopardizing its use as a wilderness area and as a national park. The federal government has a duty to protect the uses of the land that Congress sought to promote in establishing the Park. The National Park System Organic Act, the enabling legislation for the establishment of the ENP, and the designation of the Park as a "wilderness area" pursuant to the Wilderness Act, are laws which are designed to protect the public's interest in its public resources. In interpreting the Park Service Organic Act, a District of Columbia court has held that the Secretary "has an absolute duty . . . [derived from the relevant statutes] to take whatever actions and seek whatever relief as will safeguard the units of the National Park System."<sup>220</sup> Another court in California has held that the enabling legislation of the Redwoods National Park imposed a legal duty on the Secretary to use the powers given him "whenever reasonably necessary for the protection of the park."<sup>221</sup> In interpreting the administrative agency's duty under the Wilderness Act, the Colorado District Court has held that the agency has a statutory duty

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218. 16 U.S.C. § 410(c) (1982).

219. SOUTH FLORIDA WATER MANAGEMENT DISTRICT, *supra* note 181, at 1.

220. *Sierra Club v. Andrus*, 487 F. Supp. 443, 448 (D.D.C. 1980) (quoting S. Rep. No. 528, 95th Cong. 1st Sess. 9 (1977)).

221. *Sierra Club v. Department of the Interior*, 376 F. Supp. 90, 95 (N.D. Cal. 1974).

to protect wilderness water resources.<sup>222</sup>

The *Andrus* court determined that the Department of Interior has "broad discretion in determining what actions are best calculated to protect Park resources."<sup>223</sup> Although the statutory duties to protect the Park exist, the mechanisms for acquitting the Secretary's responsibilities have not been clearly identified. One mechanism suggested by the *Andrus* court which could be employed when a Park's water supply is imminently threatened is a common law action in nuisance.<sup>224</sup> Injunctive relief can be sought where relief cannot be authorized from existing legislation. The law of public nuisance can be applied to regulate activities which violate the water rights of the park, threaten to destroy the character of the park as a wilderness area, and threaten federal and state interests in the Everglades ecosystem. In researching the issue of the Secretary's authority to protect national parks from air pollution originating outside the parks, the Congressional Research Service (CRS) concluded that the intent of the 1978 Amendment to the Park System Organic Act "may have been to precipitate more suits to protect the parks from harmful outside activities."<sup>225</sup> The CRS suggested that "Congress expected the Secretary to act . . . with the same authority that any land owner has."<sup>226</sup> This includes an action by the Department of Interior to abate a nuisance on adjacent land.

### 1. *Actions by the Federal Government Under the Law of Nuisance*

Although nuisance actions generally involve disputes between neighboring property owners and are litigated in state courts pursuant to state law, there is an early case in which the federal government brought an action in federal court

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222. *Sierra Club v. Block*, 622 F. Supp. 842, 865 (D. Colo. 1985).

223. *Andrus*, 487 F. Supp. at 448.

224. *Id.*

225. GAO REPORT, PARKS AND RECREATION, LIMITED PROGRESS MADE IN DOCUMENTING AND MITIGATING THREATS TO THE PARKS 56 (Feb. 1987).

226. *Id.*

under federal common law. In *Camfield v. United States*,<sup>227</sup> the federal government's authority to regulate activities occurring beyond the boundaries of federal property was upheld by the Supreme Court. The U.S. had granted odd-numbered lots of land to a private owner and had retained the even-numbered lots for the U.S. The private owner built fences around his own sections of land near the boundary lines, and in doing so, enclosed the entire tract of land in violation of a federal statute which prohibited the enclosure of federal lands. The U.S. sued to compel the removal of the fences from the private property. The Court found the conduct to be a nuisance under common law, and "found intolerable the prospect of the federal government having something less than the rights of an ordinary proprietor to abate a nuisance."<sup>228</sup>

While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, we do not think that the admission of a Territory as a State deprives [Congress] of the power of legislating for the protection of the public lands . . . A different rule would place the public domain of the United States completely at the mercy of state legislation.<sup>229</sup>

The Court upheld the government's authority to regulate activities beyond the boundaries of federal property by relying on the Property Clause, and the common law doctrine of nuisance.

Similarly in *United States v. Luce*,<sup>230</sup> the federal government brought a nuisance suit against a Delaware fish factory that was producing offensive odors which affected persons living at a federal quarantine station. The court opined "[t]hat the government, in the absence of a plain, adequate and complete remedy at law has a right to maintain an injunction bill to restrain a nuisance materially and injuriously affecting the

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227. 167 U.S. 518 (1897).

228. Sax, *supra* note 77, at 252.

229. 167 U.S. at 525-26.

230. 141 F. 385 (C.C.D. Del. 1905).

occupancy of its own property there can be no doubt."<sup>231</sup> The *Luce* court cited *Camfield* for this holding.

The Department of Interior considered bringing a common law action in nuisance to enjoin the construction of the Gettysburg Tower which the park considered to be an aesthetic nuisance.<sup>232</sup> The Park Service did not do so, but no reasons were ever given.<sup>233</sup> The *Andrus* court suggested that the Secretary of the Interior would be required to take action if a national park was facing "a real and immediate water supply threat to the scenic, natural, historic, or biotic resource values" of the park.<sup>234</sup> The court further stated that the Secretary is not limited to any single means and suggested trespass or nuisance actions as one of several possible actions. The federal common law of nuisance, however, has been sharply curtailed by the Supreme Court in situations where a federal regulatory program exists such as water pollution control under the Clean Water Act.<sup>235</sup> It seems likely that a nuisance action on behalf of the Everglades National Park would have to be brought under Florida state nuisance law.

## 2. Florida Nuisance Law

The federal government or an individual could bring an action to abate a public nuisance based upon common law and arguably Florida's public nuisance statute, and rely on possible violations of (a) the water quality standards agreed to by the Corps, the Park, and the District, (2) state water quality standards, and (3) the Florida SWIM Act, as evidence of the nuisance.

Under common law, a public nuisance is a substantial and unreasonable interference with a community's exercise of a

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231. *Id.* at 419.

232. *Sax, supra* note 77, at 248.

233. *Id.*

234. *Andrus*, 487 F. Supp. at 448.

235. *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981). Although arguably non-point source pollution is not regulated comprehensively by a federal agency, the 1987 Amendments to the Clean Water Act are an attempt to address the problem of non-point source pollution. See Water Quality Act of 1987, P.L. 100-4, § 319 (approved Feb. 4, 1987), on non-point source management programs.



public right.<sup>236</sup> "A common or public nuisance is the doing of or the failure to do something that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience, or injury to the public."<sup>237</sup> A public nuisance could be alleged for the activities of the water district which manipulate and divert the natural flow of the Everglades water supply in such a way as to threaten the public interest. The diversion and degradation of the water supply threaten to destroy an area established by Congress as a national park and as a wilderness area, violate the water rights of the Park and the water quality agreement, and jeopardize the use of the land for the purposes which Congress intended. This is an unreasonable interference with the use of the land and the public's right to enjoy the land.

Under Florida law, a citizen may sue on behalf of the state to enjoin a public nuisance.<sup>238</sup> A public nuisance is defined by statute as "[a]ll nuisances which tend to annoy the community or injure the health of the citizens in general."<sup>239</sup> Although the public nuisance statute that states that "any building, booth, tent, or place which tends to annoy the community or injure the health of the community" addresses activities such as gambling and prostitution, the language of the cases under it suggests that other activities may be enjoined if they annoy or disturb the free use, possession, or enjoyment of property in which the public has an interest.<sup>240</sup>

The existence of state water and air pollution statutes has not prevented citizens from seeking remedies at common law for trespass and nuisance. In *Wetzel v. A. Duda & Sons*, riparian property owners brought an action to abate water pollution based on nuisance and not under the State's Environ-

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236. PROSSER, PROSSER ON TORTS 643-45 (5th ed. 1984).

237. *Commonwealth v. South Covington & Cincinnati Street Railway Co.*, 181 Ky. 459, 463, 205 S.W. 581, 583 (1918).

238. FLA. STAT. § 60.05(1) (1987).

239. FLA. STAT. § 823.01 (1987).

240. See EISENBUD, AN EXAMINATION OF THE LAW RELATING TO THE WATER RIGHTS OF EVERGLADES NATIONAL PARK, UNIVERSITY OF MIAMI SEA GRANT PROGRAM, TECHNICAL BULL. NO. 21 at 271-72 (Jan. 1972).

mental Protection Act.<sup>241</sup> The court held that property owners were not required to exhaust their administrative remedies under the EPA before seeking injunctive relief. Similarly, in *State ex rel. Shevin v. Tampa Electric Co.*, the state attorney general brought a public nuisance action for injunctive relief against an electric company for discharging noxious chemicals. The court stated that compliance with an administrative regulation and a balance of technological infeasibility versus public necessity was irrelevant to the determination of what constitutes a nuisance as a matter of law.<sup>242</sup> The court held that the doctrine of primary jurisdiction was not applicable because the legal effect of the activity, a public nuisance, together with an appropriate remedy, is peculiarly a judicial matter.<sup>243</sup> "A given activity can constitute a judicially abatable nuisance notwithstanding full compliance with either legislative mandate or administrative rule."<sup>244</sup>

The statutes in both cases had specific provisions preserving common law rights. In *Town of Surfside v. County Line Land Co.*,<sup>245</sup> a citizen did not have to exhaust administrative remedies before bringing an action to enjoin a public nuisance caused by a town's operation of a dump. The town argued that it had a certain time length to comply with the State Department of Pollution Control regulations, but because the citizen instituted his action based on the common law right to abate a nuisance rather than to enjoin a regulatory violation, the court upheld the action.

Florida courts appear to be receptive to nuisance actions for environmental damage. A nuisance action for the Park would be useful where there is no adequate remedy at law.

### C. Federal Reserved Water Rights Doctrine

The doctrine of federal reserved water rights has been defined by the Supreme Court. "This Court has long held that

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241. 306 So. 2d 533 (Fla. Dist. Ct. App. 1975).

242. 291 So. 2d 45 (Fla. Dist. Ct. App. 1974).

243. *Id.* at 48.

244. *Id.*

245. 340 So. 2d 1287 (Fla. Dist. Ct. App. 1976).

when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."<sup>246</sup>

The reservation vests on the date of reservation and is superior to the rights of future appropriators. The Court bases this federal authority on the Commerce Clause and the Property Clause. Reserved rights were first enforced for federal Indian reservations,<sup>247</sup> then extended to non-Indian reserved federal lands,<sup>248</sup> and has been applied to groundwater.<sup>249</sup> In *United States v. New Mexico*, the scope of the doctrine was examined, and the Court held that reserved water is available only to the extent it is needed to accomplish the original purpose of the land's withdrawal.<sup>250</sup> The Court examined the issue of what quantity the government had reserved in creating national forests, and held that water was reserved to accomplish the purpose of the forest which was "to preserve the timber or to secure favorable water flows."<sup>251</sup>

The doctrine thus far has only been applied in appropriative rights states, and it is not clear whether the Supreme Court has intended that the doctrine be applied in riparian states. One commentator notes that the attorneys for the government in *Winters* thought "that what was reserved to the government was simply a riparian right."<sup>252</sup> The government's brief stated that "the theory of the bill of complaint is . . . that the doctrine of riparian rights prevails in Montana."<sup>253</sup>

In the situation of the Everglades National Park, the entire purpose of the establishment of the park was wilderness

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246. *United States v. Cappaert*, 426 U.S. 128, 138 (1976).

247. *Winters v. United States*, 207 U.S. 564 (1908).

248. *Arizona v. California*, 373 U.S. 546 (1963). (Lake Mead National Recreation Area, Havasu Lake Wildlife Refuge, Imperial National Wildlife Refuge, Gila National Forest).

249. *Cappaert*, 426 U.S. 128 (1976).

250. 438 U.S. 696 (1978).

251. *Id.* at 718.

252. Robb, *Applying the Reserved Rights Doctrine in Riparian States*, 14 N.C. CENT. L.J. 98, 104 (1984).

253. *Id.* at 104-05, n.43.

preservation due to its unique primitive conditions and flora and fauna. The "wilderness area" designation was an affirmation of Congress' purpose. The reserved water rights doctrine relates primarily to water quantity.<sup>254</sup> The Park's annual water quantity allotment has been set by a Congressional Act. The issue facing the Everglades relates not only to sufficient quantity, but water of sufficient purity. Even if the reserved water rights doctrine were to be applied in a riparian state, and to a reclamation project, the issue of quality would remain.

### V. Possible Remedies and Conclusion

The legal issues arising from the water management problems in relation to Everglades National Park are exceedingly complex. If a court were to find ongoing violations of NEPA, a failure of the state through the district to protect the public trust interests in surface waters and the Park, violations of the Florida SWIM Act and State Water Quality Standards, and a public nuisance, the remedies needed to address these issues would also be complex.

The type of law suit which would be necessary in this case has been described by one commentator as public law litigation.<sup>255</sup> Public law litigation has been described as having the following characteristics: (1) a sprawling and amorphous party structure which can change during the course of the litigation, (2) the scope of the law suit is shaped by the court and the parties, (3) the subject matter is not a dispute between private parties but a dispute about the operation of public policy, (4) the relief is forward looking and must be flexible, (5) the remedy is negotiated, and (6) the judge has a continuing role after a decree is issued and creates and manages complex forms of ongoing relief.<sup>256</sup>

Injunction is the proper remedy for a court that finds

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254. *Id.* at 103.

255. Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976).

256. *Id.* at 1302-03. See also Thompson & Seibert, *Remedies: Damages, Equity and Restitution* § 6.07 (1983).

that the SFWMD's Flood Control Project cannot be managed to the detriment of the Park. This case is similar to a category of cases described by Justice Story as "Cases of Nature, calling for the . . . remedial interposition of the Courts of Equity."<sup>257</sup> These cases requiring injunctions were listed as involving the obstruction of water courses, the diversion of streams, and the pulling down of the banks of rivers.<sup>258</sup> This type of claim concerning the destruction of an ecosystem can be deemed to be extraordinary because it is a dispute about the operation of public policy. The structural injunction or structural-public law injunction should be utilized because in this situation the reorganization of an ongoing institution is sought.<sup>259</sup> This type of injunction is not exclusively preventative.

The structural injunction would address required and prohibited acts which would be described with specificity. The judge would have a continuing relationship with the parties, and the parties could be required to make progress reports to the court. The following issues should be addressed:

(1) *Water District Planning and Decision Making.* The possible NEPA violations, and the fact that an environmentally destructive Interim Action Plan has been in operation for nine years and is no longer a temporary plan, must be addressed. There should be one comprehensive overall environmental impact study done by the Corps, the District, and the Park to consider all alternatives. The piecemeal decision making process regarding the fate of the Everglades ecosystem has contributed greatly to the present problems. One comprehensive plan should be designed for the entire watershed. Water quantity and quality issues for the Park should be addressed simultaneously.

(2) *Water Quality Violations.* The Memorandum of Agreement between the Corps, the District, and the Park

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257. Story, *Commentaries on Equity Jurisprudence as Administered in England and America* § 927 (12th ed. 1877).

258. *Id.*

259. FISS, *THE CIVIL RIGHTS INJUNCTION* 7 (1978). The development of the structural injunction and its relation to the civil rights era is described.

must be adhered to. The Park should have the option of readjusting the water quality standards due to new scientific evidence. The points of discharge from the project onto conservation lands should be subject to federal or state permits with enforcement mechanisms.

(3) *Cleanup or Treatment Program for Agriculture.* Agriculture should be responsible for treating and/or cleaning up its own waste in the Everglades Agricultural Area before the runoff is released to the Water Conservation Areas. Various alternatives have been suggested in state reports such as the creation of flow-ways or retention ponds. Agriculture has refused to take any of its own land out of production to solve water pollution problems. Instead, agriculture's plan is to divert the polluted water to other state conservation areas. This should be an unacceptable solution. Diversion does not address the problem, and is contributing to the loss of native habitat in the Everglades.

The nutrient-laden water continues to destroy the Everglades ecosystem. Since 1979, the area damaged by the polluted water has increased from 7,000 acres to 20,000 acres. Biologists believe that the harm probably cannot be undone. Because the damaged area is expanding, interim plans do not suffice. Best Management Practices are not working and are an incomplete solution. A working permanent solution must be designed and implemented by the state. Agriculture should not be permitted to dispose of its waste onto public property.

Because public trust values are not being considered in south Florida, the current water diversion system's diversion scheme is resulting in unjustified harm to public trust interests. The judiciary's intervention is necessary. An example of judicial intervention relating to water supply and diversion is the Mono Lake litigation.<sup>260</sup> Currently an injunction is operating against the Grant Lake Dam which is operated by a city water and power authority. The authority must maintain a minimum instream flow of so many cubic feet per second in a

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260. Note, *The Public Trust Doctrine as a Source of State Reserved Water Rights*, 63 DEN. U. L. REV. 585 (1986). This injunction was issued by the Superior Court of Mono County.

non-navigable tributary of Mono Lake. One commentator characterizes this judicial order as "the first instance of a judicially-created quantified public trust water right in a non-navigable stream."<sup>261</sup> The potential destruction of a national park requires a unique remedy fashioned by a court's equitable discretion.

The Everglades National Park and Wilderness Area is not able to meet the high standard of "unimpairment" mandated by Congress through the Wilderness Act. Its water supply has been manipulated, removed, diverted, and degraded. The Park is losing its ability to support the unique forms of wildlife and plant life which is its intended use by Congress. The unnatural water conditions have led to a decline in Everglades wildlife as evidenced by the plight of its wading birds. Between 1970 and 1987, woodstorks and other waders experienced a significant decline in numbers. In 1960, the mean number of breeding pairs was 2370, compared to a mean annual breeding population of storks between 1980 and 1987 of 374. Exotic fish and plants are invading the Everglades. The conversion of peripheral wetlands and the expansion of well fields for cities has resulted in the loss and degradation of native habitat. Productivity in the Florida Bay estuaries is declining.

The degradation of a major component of the Park's water supply should not be considered to be just one of a number of threats which the Park has faced since its establishment. Rather, it can be viewed as the final threat which may cause its ultimate destruction. The Park is not the only player with a stake in the outcome of this controversy. The entire south Florida ecosystem is at risk.

## VI. Postscript

Following the completion of this article, a federal lawsuit was initiated on behalf of the Everglades National Park. On October 13, 1988, the U.S. Attorney of Miami, Florida filed a complaint against the South Florida Water Management Dis-

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261. *Id.*

strict and the Florida Department of Environmental Regulation in the United States District Court, Southern District of Florida.<sup>1</sup> Allegations in the complaint charge the SFWMD and the DER with violations of state and federal law and the public trust in failing to regulate water pollution,<sup>2</sup> operating unpermitted structures, breach of express contract,<sup>3</sup> nuisance and violation of riparian rights under state and federal law, violations of the Property Clause of the U.S. Constitution,<sup>4</sup> the National Park Service Organic Act,<sup>5</sup> the Everglades National Park Authorization Act,<sup>6</sup> and the Wilderness Act.<sup>7</sup>

The SFWMD and the DER are charged with the failure to prevent polluted agricultural runoff from reaching the Arthur R. Marshall Loxahatchee National Wildlife Refuge and the Everglades National Park. The suit asks the court to order the SFWMD and the DER to enforce the state water quality standards and those in the Memorandum of Agreement, and seeks an injunction against the two agencies to prevent them from delivering polluted water to Loxahatchee and the Everglades National Park. Environmental groups seeking to intervene are the Wilderness Society, The Environmental Defense Fund, the Sierra Club, the National Wildlife Federation, the National Parks and Conservation Association, Defenders of Wildlife, the Florida Audubon Society and the Florida Wildlife Federation.

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1. *United States v. South Florida Water Management District*, Complaint, Civ. No. 88-1886 (S.D. Fla. October 13, 1988).

2. FLA. STAT. § 373.4595 (2) (a) 1.

3. Interagency Memorandum of Agreement between the U.S. Army Corps of Engineers, the South Florida Water Management District, and the Everglades National Park, February 10, 1984 (on water quality standards for deliveries to the Park).

4. U.S. Const. Art. IV, Sec. 3, Cl. 2.

5. 16 U.S.C. §§ 1, 1a-1 (1982 & Supp. 1986).

6. 16 U.S.C. § 410 (c) (1982).

7. 16 U.S.C. §§ 1131-1136 (1982 & Supp. 1986).